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Supreme Court, U.S.
FILED

No. 06-1143

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In the

Supreme Court of the United States

ALLLEGIS REALTY INVESTORS, ET AL.,

Plaintiffs-Petitioners,

v.

JOHN LOTUS NOVAK, DuPage County Treasurer,

Defendant-Respondent.

NAPERVILLE TOWNSHIP ROAD DISTRICT,

Intervenor-Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fourteenth Amendment prohibits a retroactive substantive change of State law from destroying a claim for a tax refund initiated seven years before the effective date of the statutory change.

2. Whether the Due Process Clause of the Fourteenth Amendment prohibits a retroactive substantive change of State law from destroying the clear and certain statutory postdeprivation remedy for contesting taxes to the effect that meaningful backward-looking relief from illegal taxation is no longer available.

PARTIES TO THE PROCEEDING

In the Supreme Court of Illinois the parties to the proceeding were:

1. Plaintiffs - Allegis Realty Investors, LLC, a Delaware Limited Liability Corporation, and Kehoe Partnership, an Illinois Partnership, the taxpayers.
2. Defendant - John Lotus Novak, DuPage County Treasurer and Ex-Officio Collector of Taxes.
3. Intervenor - Naperville Township Road District, affected taxing district.

Pursuant to Rule 29.6, Allegis Realty Investors has merged and now does business under the name UBS Realty Investors, LLC. UBS Realty Investors, LLC is a subsidiary of UBS AG, a publicly traded Swiss corporation. UBS AG has its headquarters in Basel and Zurich, Switzerland. UBS Realty Investors, LLC has its headquarters in Hartford Connecticut and additional offices in Dallas, San Francisco and New York City.

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REPORTS OF OPINIONS AND ORDERS

The opinion of the Supreme Court of Illinois reversed the judgment of the Appellate Court of Illinois, 2nd Judicial District, which had reversed the entry by the trial court of a summary judgment in favor of the affected taxing district.

The opinion of the Supreme Court of Illinois is found at *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, ___ N.E. 2d ___, ___ Ill. Dec. ___ (September 21, 2006). A copy of the court's slip opinion is included in the appendix to this petition (A1 - A21) and may also be found in the Opinion Archives section of the web site of the Supreme Court of Illinois.

The opinion of the Appellate Court of Illinois is found at *Allegis Realty Investors v. Novak*, 356 Ill. App. 3d 887, 827 N.E.2d 485, 292 Ill. Dec. 956 (2nd Dist. 2005).

JURISDICTION

The opinion of the Supreme Court of Illinois was filed on September 21, 2006. A1. The petition for rehearing was denied by order entered November 27, 2006. A22.

Jurisdiction to review the judgment of the Supreme Court of Illinois by a writ of certiorari is conferred by 28 USC § 1257.

The mandates in this case, consolidated appeals when heard by the Supreme Court of Illinois, were issued on January 2, 2007 and each mandate provides "(a)ppellate court judgment reversed; circuit court judgment affirmed; cause remanded." Rule 369(b) of the Rules of the Supreme Court of Illinois states that if the reviewing court affirms the judgment and the mandate is filed in the trial court "enforcement of the judgment may be had and other proceedings may be conducted as if no appeal had been taken." The summary judgment is final.

This case draws the constitutionality of Illinois Public Act 94-692 (effective November 3, 2005) into question. Therefore, 28 U.S.C. § 2403(b) may apply. This petition for a writ of certiorari has been served upon the Honorable Lisa M. Madigan, Attorney General of Illinois, 500 S. Second Street, Springfield, Illinois 62706 (and also upon Mr. Gary S. Feinerman, Illinois Solicitor General and Assistant Attorney General, 100 W. Randolph Street, 12th Floor, Chicago, Illinois 60601).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Illinois Public Act 94-692 (effective November 3, 2005).

Sections 23-5, 23-10 and 23-15 of the Illinois Property Tax Code (35 ILCS 200/23-5, 23-10 and 23-15 (West, Illinois Compiled Statutes 2004, State Bar Edition)).

The full text of the Statutes and Constitutional provision here involved is found in the appendix to this petition at A23 - A28.

STATEMENT OF THE CASE

This case involves Illinois real estate taxes levied in 1997. The Illinois statutory scheme requires payment of all taxes in full and under protest prior to any claim being filed that a portion of the tax collected by the county treasurer is illegal. Section 23-5 (A25). The statute of limitations for filing claims is 75 days after the last installment of taxes becomes due. Section 23-10 (A25 - A27). The statutory remedy declares that it "shall be construed to provide a complete remedy for any claims

with respect to those taxes, assessments, or levies" (Section 23-15(b)(1)) and contemplates a refund of the illegal portion of the taxes. Section 23-15(c) (A27 - A28).

Petitioners (taxpayers) paid their 1997 taxes when due in 1998 and timely filed their action seeking a refund of part of the taxes levied by the intervening taxing district. In January, 2005, the Appellate Court of Illinois found that the portion of the 1997 taxes levied by the intervening taxing district for hard road purposes was "ultra vires and void" because the 1997 election to re-authorize the tax levy had been petitioned by less than 10% of the voters and approved at a thinly-attended (52 persons) town meeting rather than at a general election as required by the Illinois Township Code. *Allegis, supra...*, 356 Ill. App. 3d at 892-893, 827 N.E.2d at 490, 292 Ill. Dec. at 960,

After the decision by the appellate court, and after the Supreme Court of Illinois had already accepted jurisdiction of the case, the Illinois Legislature, at the urging of the taxing district, enacted Public Act 94-692 (effective November 3, 2005), a "curative act" approving of or curing the election at the town meeting. A23 - A24.

Because the "curative act" was first mentioned in the reply brief of the taxing district, taxpayers sought and were granted leave to file a surreply or supplemental brief limited to issues raised by the passage of the "curative act."

In that surreply or supplemental brief, taxpayers argued that: (1) there was no clear intent in the language of the "curative act" that it apply to pending claims and, therefore, it should not be given retroactive effect;[1] and (2) if the

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[1] In *Commonwealth Edison Company v. Will County Collector*, 196 Ill. 2d 27, 39, 749 N.E. 2d 964, 255 Ill. Dec. 482 (2001), the (continued...)

"curative act" was applied retroactively to cure the defective election, taxpayers' rights protected by the Due Process Clauses of the Illinois and United States Constitutions would be violated because:

a. The period of retroactivity was excessive;

b. Taxpayers had obviously been singled out for retaliation for being victorious in the appellate court; and

c. Illinois had played "bait and switch" with the apparent clear and certain postdeprivation remedy which promised meaningful backward-looking relief - a refund of the illegal tax. A29 - A30.

In its opinion, the Supreme Court of Illinois found that a 7-year period of retroactivity existed, but that such a period of retroactivity was "inconsequential." A19. Further, it found that the taxpayers had not been singled out for improper treatment. A18.

However, the Supreme Court of Illinois failed to respond to taxpayers' "bait and switch" argument in its opinion. The conclusion of the opinion was that no state or federal due process rights were violated by the retroactive effect attributed to the "curative act." A20.

Taxpayers' petition for rehearing asked that a response be made to the "bait and switch" argument concerning the denial of any postdeprivation remedy and asked the Court to reconsider its conclusion that no federal due process rights were violated. A31 - A38. The Supreme Court of Illinois denied the petition for rehearing without comment and without change in the opinion. A22.

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[1] (...continued)
Supreme Court of Illinois stated it was adopting the method of analyzing retroactivity first used by this Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994).

The relevant portions of the surreply or supplemental brief and the petition for rehearing where taxpayers' federal due process arguments were raised are set forth in the appendix to this petition. A29 - A38.

ARGUMENT

The "inconsequential" 7-year period of retroactivity allowed by the Supreme Court of Illinois in this case conflicts with the statement of this Court that any period of retroactivity must be "modest" and confined to a "short and limited" period. *United States v. Carlton*, 512 U.S. 26, 33, 129 L. Ed. 2d 22, 30, 114 S. Ct. 2018, 2023 (1994). See, also, *Carlton*, concurrence of O'Connor, J., 512 U.S. at 35, 129 L. Ed. 2d at 33, 114 S. Ct. at 2026. ("A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions.")

In the present case, the statute requiring a general election to authorize this type of tax had been enacted by Public Act 83-281 (effective January 1, 1984) by the 1983 Illinois Legislature and was retroactively amended twenty-two years later by the 2005 Illinois Legislature.

Moreover, Illinois statutory law forces taxpayers into a postdeprivation remedy to contest their taxes. In a long line of cases this Court has held that where a State coerces a taxpayer into a "pay first; litigate later" situation, due process requires that the State thereafter provide meaningful backward-looking relief. See, *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673, 678-682, 74 L. Ed. 1107, 1112-1114, 50 S. Ct. 451, 453-455 (1929); *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Florida Department of Business Regulation*, 496 U.S. 18, 32-41, 110 L. Ed. 2d 17, 32-39, 110 S. Ct. 2238, 2247-2252 (1990); *Harper v. Virginia Department of*

Taxation, 509 U.S. 86, 100-102, 125 L. Ed. 2d 74, 88-89, 113 S. Ct. 2510, 2519-2520 (1993).

More recently, this Court has forcefully decried "bait and switch" tactics by States when they promise a "clear and certain" postdeprivation remedy for illegal taxation and later declare that remedy to be unavailable. *Reich v. Collins*, 513 U.S. 106, 108, 130 L. Ed. 2d 454, 457, 115 S. Ct. 547, 549 (1994); *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442, 445-446; 139 L. Ed. 2d 888, 891, 118 S. Ct. 904, 905 (1998).

In *McKesson*, supra., this Court declared that the interest of a State in fiscal security could thereafter be sufficiently protected by a requirement of full payment of the tax prior to filing suit and a short statute of limitations regarding claims. 496 U.S. at 50, 110 L. Ed. 2d at 44, 110 S. Ct. at 2257. Illinois requires payment of the tax in full prior to raising claims of illegal taxation and the statute of limitation for filing claims is a mere 75 days from the date the tax is due.

"Curative acts" passed 7 years after the claim for a refund must be filed protect no legitimate State interest. They merely demonstrate the "lawlessness" inherent in the Illinois system of taxation for corporate taxpayers who cannot vote in Illinois and who, like Allegis Realty Investors, LLC, are engaged in interstate commerce.

In Illinois, taxpayers who seek to have claims of illegal taxation adjudicated by the courts may summarily have those claims extinguished seven years after they are filed and without regard to whether the tax, when levied, was legal. Such summary action denies them a hearing on the meaningful backward looking relief promised in the Illinois statutes and cannot be constitutional as applied to taxpayers' claims.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ALLEGIS REALTY INVESTORS, ET AL.,

Petitioners.

BY: _____

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APPENDIX

Docket Nos. 100682, 100730 cons.

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

ALLEGIS REALTY INVESTORS *et al.*, Appellees, v. JOHN LOTUS NOVAK, County Treasurer and *ex-officio* County Collector of Du Page County, *et al.*, Appellants. *Opinion filed September 21, 2006.*

JUSTICE KARMEIER delivered the judgment of the court, with opinion.

Chief Justice Thomas and Justices Freeman, Fitzgerald, Kilbride, and Garman concurred in the judgment and opinion.Justice Burke took no part in the decision.

OPINION

Plaintiffs, Allegis Realty Investors and other taxpayers from Du Page County, filed objections under section 23-10 of the Property Tax Code (35 ILCS 200/23-10 (West 1998)) to various taxes imposed in 1997 by several units of local government. Among the taxes challenged, and the only one at issue in this case, was the 1997 permanent road (hard-road) tax levied by Naperville Township Road District (the Road District). The Road District intervened in the case and moved for summary judgment. Its motion was granted, and the challenge to its 1997 hard-road tax levy was rejected.

Plaintiffs subsequently brought an interlocutory appeal pursuant to Supreme Court Rule 304(a) (155 Ill. 2d R. 304(a)). The appellate court reversed and remanded, concluding that there was a genuine issue of fact, precluding summary judgment, with respect to whether the statutory requirements for the tax levy had been satisfied. 356 Ill. App. 3d 887. The Du Page County treasurer and the Road District filed

separate petitions with our court seeking leave to appeal. 177 Ill. 2d R. 315. We granted those petitions and consolidated them. While the matter was pending in our court, the General Assembly enacted amendatory legislation specifically validating the tax authorization methods challenged in this case. The primary issue now before us is whether this new legislation may be applied retroactively to validate the tax levy at issue here. For the reasons that follow, we hold that it can. The judgment of the appellate court is therefore reversed, the judgment of the circuit court granting summary judgment in favor of the Road District is affirmed, and the cause is remanded to the circuit court for further proceedings.

BACKGROUND

The Illinois Highway Code (605 ILCS 5/1-101 *et seq.* (West 1998), formerly Ill. Rev. Stat. 1977, ch. 121, par. 1-101 *et seq.),* authorizes local road districts to levy permanent-road taxes for the purpose of constructing and maintaining gravel, rock, macadam or other hard roads (see 605 ILCS 5/6-601 *et seq.* (West 1998)). Where a county is organized into townships, as Du Page County is, the township is considered to be and is called the road district for "all purposes relating to the construction, repair, maintenance, financing and supervision" of township roads, except in circumstances not present here. 605 ILCS 5/6-102 (West 1999). Accordingly, Naperville Township, which is located in Du Page County, is the Road District referred to in this case and the entity responsible for the hard-road tax levy involved in this appeal.

The Road District has levied hard-road taxes for many years, both before and after 1979. During that time, however, the statutory authorization schemes governing road district tax levies changed. Prior to 1979, the law limited authority to levy hard-road taxes to no more than five years. After the expiration of the five-year period, townships were required to

reauthorize the levy at the annual township meeting or through a road district election. See Ill. Rev. Stat. 1977, ch. 121, pars. 6-601, 6-602. The Road District received authority for a hard-road tax levy in accordance with these provisions at Naperville Township's 1979 annual township meeting.

After the 1979 hard-road tax levy was approved, the General Assembly amended the law governing hard-road tax levies to repeal the five-year authorization limit. Effective January 1, 1980, authority to levy hard-road taxes, once obtained, would remain permanent until repealed by referendum. See *Ceres One Corp. v. Naperville Township Road District,* 343 Ill. App. 3d 382, 385 (2003).

Between April 1979 and February 1997, the Road District levied a hard-road tax every year without holding a new referendum for its reauthorization. Several objections were filed against the tax. Most were settled. The Road District did not, however, settle objections filed by a group of objectors which included Ceres One Corporation (see *Ceres One Corp. v. Naperville Township Road District,* 343 Ill. App. 3d 382 (2003)). That matter, which was addressed to the Road District's 1996 hard-road levy, remained pending when plaintiffs filed the objections underlying the present appeal.

As part of its challenge to the 1996 levy, Ceres One Corporation asserted that the 1979 authorization on which the 1996 tax levy was based had long since expired and that the statutory amendments eliminating the five-year authorization limit could not be applied retroactively to validate it. In light of that challenge, a decision was made by the Road District to seek authorization of the tax for 1997. Signatures were obtained from 50 registered voters in support of a petition to hold a referendum to obtain the necessary authorization. The signatures were collected in February of 1997, and the petition was received by the Road District's clerk on

March 13, 1997. In accordance with statutory requirements, notice of the referendum was subsequently published in a newspaper of general circulation on March 26, 1997. The proposition was duly submitted for a vote at the township meeting on April 8, 1997, and passed. By a vote of 51 to 0, authorization for the tax was granted.

On November 13, 1998, plaintiffs filed a complaint in the circuit court of Du Page County objecting to various taxes levied by several county taxing districts in 1997 and seeking refunds of those taxes. Plaintiffs' Objection H specifically attacked the Road District's 1997 hard-road tax levy on the ground that the 1979 referendum authorizing the tax in question was void because proper notice was not provided per section 6-601 of the Illinois Highway Code (Ill. Rev. Stat. 1977, ch. 121, par. 6-601). The Road District was granted leave to intervene to dispute that objection.

While plaintiff's cause of action was pending in the circuit court, our appellate court entered judgment in the case arising from Ceres One Corporation's challenge to the Road District's 1996 hard-road tax levy. The appellate court's decision affirmed the judgment of the circuit court which had held the 1996 hard-road tax levy invalid. In the appellate court's view, the 1979 hard-road tax authorization, which served as the predicate for the 1996 tax levy, was subject to the five-year authorization contained in the statute at the time the 1979 levy was approved. That period had expired and no new authorization had been sought or granted. Although the General Assembly subsequently repealed the five-year limitation, the court noted that additional legislative action had the effect of partially restoring the five-year limitation. In the appellate court's view, that partial restoration applied to the 1979 hard-road tax. The statutory provision eliminating the five-year limitation applied only to levies approved after January 1, 1980, and could not be applied retroactively to the Road District's 1979 levy. *Ceres One Corp. v. Naperville Township Road District,* 343 Ill. App. 3d at 387.

The appellate court filed its opinion in *Ceres One Corp. v. Naperville Township Road District* on September 30, 2003. On January 27, 2004, the Road District filed a motion for summary judgment in this case with respect to plaintiffs' Objection H, which pertained to the 1997 hard-road tax levy. The Road District's motion contended that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law because, unlike the 1996 hard-road tax levy struck down in *Ceres One Corp. v. Naperville Township Road District*, the 1997 levy was not based on the original 1979 authorization. Rather, as outlined earlier in this opinion, the Road District had obtained new authorization for the levy through a properly called referendum at the annual township meeting held April 8, 1997.

Plaintiffs objected to the Road District's motion for summary judgment on the grounds that the 1997 referendum was invalid. Plaintiffs pointed out that while the proposition to approve the 1997 hard-road tax was presented as a measure to extend, reauthorize and reaffirm a hard-road tax levy already in existence, there was no valid hard-road tax levy then in existence. The original 1979 authorization had lapsed years earlier without being renewed, and the 1996 tax levy based on that authorization had been declared invalid. There being no valid existing hard-road tax, plaintiffs argued that the 1997 measure was, instead, an attempt to establish and increase township taxes. Such measures are governed by section 30-20(b) of the Township Code (60 ILCS 1/30-20(b) (West 1998)). That statute precludes electors at annual township meetings from establishing or increasing township taxes unless the proposal to take such action is supported by a petition containing the signatures of not less than 10% of the registered voters in the township. 60 ILCS 1/30-20(b) (West 1998). According to plaintiffs, the 50 signators to the petition submitted at the April 8 township meeting represented far less than 10% of Naperville Township's registered voters. The electors present at the

annual township meeting therefore had no authority to approve the 1997 hard-road tax levy.

Plaintiffs argued that the 1997 hard-road tax levy was also fatally infirm because the notice requirements of section 6-60 1(a) of the Illinois Highway Code (605 ILCS 5/6-601(a) (West 1998)) were not satisfied. Under that statute, notice by publication is not sufficient. Where propositions for or against hard-road taxes are to be taken up at an annual township meeting, notices that the proposition will be voted upon must be posted in at least 10 of the most public places in the town at least 10 days prior to the meeting. 605 ILCS 5/6-601(a) (West 1998). Plaintiffs contended that the Road District had failed to show that the requisite notice had, in fact, been given in this case.

In reply to plaintiffs' objections, the Road District argued that plaintiffs were improperly attempting to raise new objections to the 1997 tax levy beyond those contained in their original pleadings. The Road District also disputed plaintiffs' arguments on the merits. First, it contended that section 30-20(b) of the Township Code (60 ILCS 1/30-20(b) (West 1998)) did not apply to the permanent-road tax because, contrary to plaintiffs' characterization, the referendum in question reauthorized an existing tax. It did not establish or increase a tax rate. Second, the Road District argued that it had, in fact, complied with the notice requirements set forth in section 6-601 (a) (605 ILCS 5/6-601 (a) (West 1998)). In support of that argument, the Road District submitted a fax from the township clerk to the township attorney listing the places where the notices were posted. Finally, the Road District urged the circuit court to reject a request submitted by plaintiffs to permit further discovery prior to disposition of the motion for summary judgment.

Following a hearing, the circuit court found the Road District's arguments to be meritorious and entered summary

judgment in favor of the Road District and against plaintiffs with respect to plaintiffs' objections to the 1997 hard-road tax.[1]

In so doing, the court made an express written finding pursuant to Supreme Court Rule 304(a) (155 Ill. 2d R. 304(a)) that there was no just reason to delay enforcement or appeal of its judgment.

Plaintiffs moved to vacate the circuit court's judgment and for leave to amend their objection to the 1997 hard-road tax levy in order to incorporate arguments raised in their response to the Road District's motion for summary judgment. When the circuit court declined to vacate the judgment or to allow plaintiffs leave to amend, they filed an interlocutory appeal. On that appeal, the appellate court found, as plaintiffs had argued, that the referendum regarding the 1997 hard-road tax levy was, indeed, a measure to establish or increase a township tax rate and was therefore governed by section 30-20(b) of the Township Code (60 ILCS 1/30-20(b) (West 1998)). 356 Ill. App. 3d at 891. To be valid under that statute, the measure had to have been supported by petitions containing signatures of no fewer than 10% of the registered voters in the township. In light of the fact that the petitions contained only 50 signatures, the appellate court concluded that there remained a genuine issue as to whether the minimum number of signatures required by section 30-20(b) had been secured. The court therefore reversed the circuit court's entry of summary judgment and remanded for further proceedings. 356 Ill. App. 3d at 893. Both the Du Page County treasurer and the Road District petitioned our court for leave to appeal. 177 Ill. 2d R. 315. We granted those petitions in September of 2005 and consolidated them.

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[1] In the same order, the circuit court also granted summary judgment in favor of the Naperville Township on a separate set of objections asserted in plaintiffs' initial pleadings. That aspect of the case is not relevant to the matter before us here and requires no further discussion.

Shortly thereafter, the General Assembly enacted Public Act 94-692 (Pub. Act 94-692, eff. November 3, 2005). That statute amended the Illinois Highway Code by adding section 6-620. The new provision states:

"(a) Any road district tax that was authorized by the electors at an annual or special town meeting during the years 1975 through 1979 for a period not exceeding 5 years, but that was not re-authorized within 5 years after it was authorized due to [the legislation] which repealed the 5-year limitation, is hereby validated for all tax levy years subsequent to 1980 only to the extent that the authority to tax did not automatically expire after 1980.

(b) Any road district tax that was levied prior to 1980 shall not be subject to the requirements of subsection (b) of Section 30-20 of the Township Code if that tax was or is:

(i) re-authorized by the electors at an annual or special town meeting after the year 1980; and

(ii) levied at least once during the 3-year period preceding the reauthorization." Pub. Act 94-692, eff. November 3, 2005, adding 605 ILCS 5/6-620.

Public Act 94-692 also amended section 30-20(b) of the Township Code (Pub. Act 94-692, eff. November 3, 2005, amending 60 ILCS 1/30-20(b)) to include coordinating language. With the new language indicated in italics, the provision now reads:

"(b) Notwithstanding the provisions of any other Act, *except as provided in Section 6-620 of the Illinois Highway Code,* before establishing or increasing any township tax rate that may be established or increased by the electors at the annual township meeting, a petition containing the signatures of not less than 10% of the registered voters of the township must be presented to the township clerk authorizing that action."

Public Act 94-692 was initially vetoed by the Governor. The General Assembly overrode that veto, and the new law took effect on November 3, 2005. It is against this background that the case is now before us for a decision on the merits.

ANALYSIS

While many aspects of this matter are open to dispute, one thing is not. Under Public Act 94-692, the authorization obtained in 1979 for the hard-road tax levy cannot be deemed to have expired and the 1997 levy is not subject to challenge on the grounds that it failed to comply with section 30-20(b) of the Township Code (60 ILCS 1/30-20(b) (West 1998)). If the Act applies, plaintiffs would therefore no longer have any valid basis for objecting to the 1997 hard-road tax levy. The arguments they advanced in the circuit and appellate courts would be moot, and the judgment of the appellate court reversing the circuit court's entry of summary judgment in favor of the Road District could not stand. The principal issue we must therefore decide is whether Public Act 94-692 can be applied to validate the 1997 hard-road tax levy.

As noted, this matter comes before us in the context of a motion for summary judgment. Summary judgment is proper if, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 1998). The interpretation and applicability of legislation present questions of law resolvable through summary judgment. See *Barnett v. Zion Park District, 171* Ill. 2d 378, 385 (1996). We review a circuit court's grant of summary judgment *de novo*. *Illinois State Chamber of Commerce v. Filan*, 216 Ill. 2d 653, 661 (2005). *De novo* review likewise guides our consideration of the meaning and effect of statutory provisions. *Hawthorne v. Village of OlympiaFields*, 204 Ill. 2d 243, 254-55 (2003).

Whether Public Act 94-692 should be applied to the hard-road tax levy challenged in this case turns on questions of retroactivity. In assessing whether a statute applies retroactively, this court has adopted the approach set forth by the United States Supreme Court *in Landgraf v. USI Film Products*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). *Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27, 37-39 (2001). The *Landgraf* analysis consists of two steps. First, if the legislature has expressly prescribed the statute's temporal reach, the expression of legislative intent must be given effect absent a constitutional prohibition. Second, if the statute contains no express provision regarding its temporal reach, the court must determine whether the new statute would have retroactive effect, keeping in mind the general principle that prospectivity is the appropriate default rule. In making this determination, a court will consider whether retroactive application of the new statute will impair rights a party possessed when acting, increases a party's liability for past conduct, or impose new duties with respect to transactions already completed. If retrospective application of the new law has inequitable consequences, a court will presume that the statute does not govern absent clear legislative intent favoring such a result. *Landgraf*, 511 U.S. at 280, 128 L. Ed. 2d at 262, 114 S. Ct. at 1505; see *Commonwealth Edison Co.*, 196 Ill. 2d at 38.

After adopting *the Landgraf framework*, our court considered the effect of section 4 of the Statute on Statutes (5 ILCS 70/4 (West 1998)) on our retroactivity analysis. Section 4, often referred to as the general saving clause of Illinois (see *People v. Glisson*, 202 Ill. 2d 499, 505 (2002)), provides:

> "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred or any right accrued, or claim arising under the

> former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding." 5 ILCS 70/4 (West 1998).

Our court has recognized section 4 as a clear legislative directive as to the temporal reach of statutory amendments and repeals when none is otherwise specified: those that are procedural may be applied retroactively, while those that are substantive may not. *Caveney v. Bower,* 207 Ill. 2d 82, 92 (2003). This principle applies to civil as well as criminal enactments. *Caveney v. Bower,* 207 Ill. 2d at 92-93. In light of the statute, we have held that an Illinois court need never go beyond step one of the *Landgraf* test. *People v. Atkins,* 217 Ill. 2d 66, 71 (2005). That is because the legislature will always have clearly indicated the temporal reach of an amended statute, either expressly in the new legislative enactment or by default in section 4 of the Statute on Statutes. *Caveney v. Bower,* 207 Ill. 2d at 95.

Because it is a *default* standard, section 4 of the Statute on Statutes is inapplicable to situations where the legislature has clearly indicated the temporal reach of a statutory amendment. Whenever a court is called upon to assess the applicability of a statutory change, the court must therefore still make an initial determination as to whether the legislature has clearly indicated the amended statute's temporal reach. If it has, there is no need to invoke section 4 of the Statute on Statutes. Rather, in accordance with *Landgraf,* the expression of legislative intent must be given effect absent constitutional prohibition. *Caveney v. Bower,* 207 Ill. 2d at 94.

The approach set forth *in Landgraf and* adopted by our court is time-neutral. That is, its applicability is not affected

by whether the expression of legislative intent calls for prospective or retroactive application. If the General Assembly has clearly expressed an intention that a statute be given retroactive effect, we must honor that intention unless the constitution prohibits us from doing so.

Commonwealth Edison Co. v. Will County Collector, 196 Ill. 2d 27 (2001), cited in *Caveney v. Bower*, 207 Ill. 2d at 95, illustrates this principle. In that case, the General Assembly had amended section 5-1024 of the Counties Code (55 ILCS 5/5-1024 (West 1994)) and section 9-107 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/9-107 (West 1994)) to (a) validate prior levies made by the county to cover the costs of insuring or otherwise defending itself against workers compensation and tort immunity claims and (b) prospectively exclude such levies from the general corporate rate limitation. A challenge was filed to certain taxes levied by Will County prior to the amendment's becoming a law. Because we determined that the General Assembly had clearly intended to reach those earlier tax levies, and because we concluded that retroactive application would not offend the constitution, we gave effect to the legislature's intent and upheld the statutory amendment. *Commonwealth Edison*, 196 Ill. 2d at 42.

With these principles in mind, we now consider Public Act 94-692, the statute at issue in this case, which added section 6-620 to the Illinois Highway Code and amended section 30-20(b) of the Township Code. The initial inquiry, whether the General Assembly expressly indicated the temporal reach of the statute, is easily answered. Clearly it did. As described earlier in this opinion, the new section 6-620 of the Illinois Highway Code is specifically directed to specified Road District taxes authorized by electors at annual or special township meetings during certain years prior to Public Act 94-692's enactment. The corresponding amendment to

section 30-20(b) of the Township Code exempts those prior levies from statutory requirements to which they might otherwise have been subject. Because the changes in the law were thus directed toward events occurring before Public Act 94-692 took effect, they are intrinsically retroactive. Anything other than retroactive application could not be squared with statute's clear and unambiguous terms. That the General Assembly intended the law to apply retroactively is therefore obvious.

As we have discussed, where as here the legislature clearly intends for a statute to be applied retroactively, *Landgraf and* our decisions applying that case require that we honor the legislature's intention unless doing so would contravene the constitution. *Caveny v. Bower,* 207 Ill. 2d at 94. Plaintiffs in this case contend that upholding Public Act 94-692 to validate the 1997 hard-road tax levy would be unconstitutional for three reasons. First, they contend that the legislation violates the doctrine of separation of powers set forth in article II, section 1, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. II, §1). Second, they assert that applying the new law to uphold the 1997 tax levy would deprive them of property without due process of law in violation of article I, section 2, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, §2). Finally, for the same reasons they claim that the statute contravenes article I, section 2, of the Illinois Constitution, plaintiffs argue that it also violates the due process clause of the fourteenth amendment to the United States Constitution (U.S. Const., amend. XIV).

Whether an enactment by the General Assembly is constitutional is a matter we consider *de novo.* In undertaking our review, we presume that statutory enactments are constitutional. The burden is on the party challenging the statute to clearly establish any constitutional invalidity. The burden is a formidable one, and this court will uphold a statute's validity whenever it is reasonably possible to do so.

Vaugniaux v. Department of Professional Regulation, 208 Ill. 2d 173, 193 (2003).

1. Separation of Powers

Article II, section 1, of the Illinois Constitution of 1970 provides that the legislative, executive and judicial branches of government are separate and that "no branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, §1. The purpose of this doctrine is to insure that each of the three branches of government retains its own sphere of authority, free from undue encroachment by the other branches. *People v. Izzo*, 195 Ill. 2d 109, 116 (2001). In the context of the interplay between the legislature and the judiciary, the doctrine has been interpreted to mean that the legislature's role is to make the law and the judiciary's role is to interpret the law. *Bates v. Board of Education, Allendale Community Consolidated School District No. 17*, 136 Ill. 2d 260, 267 (1990).

Plaintiffs assert that the General Assembly overstepped its bounds when it enacted Public Act 94-692 because the legislation effectively nullifies the construction given to the prior law by the appellate court in *Ceres One Corp. v. Naperville Township Road District* and represents an impermissible attempt by the General Assembly to tell this court how to decide the present case. In making this argument, plaintiffs fail to recognize the distinction between curative legislation and a legislative declaration of the General Assembly's earlier intent. There is no question that after a final judicial interpretation of legislative intent, the legislature may not put into effect a change in that construction through a later declaration of what it did intend. See *People v. Rink*, 97 Ill. 2d 533, 541 (1983). Our court has long held, however, that legislature may by a curative act validate any proceeding which it might have authorized in advance, provided the

power is so exercised as not to infringe on constitutionally protected rights of the parties involved. *Bates*, 136 Ill. 2d at 268; *Worley v. Idelman*, 285 Ill. 214, 219 (1918).

Public Act 94-692 is curative legislation, not an unconstitutional attempt to legislatively overrule a court's interpretation of the legislature's intent. A comparison with *Bates* makes this clear. In *Bates*, taxpayers challenged bonds issued by the defendant school district on the grounds that the bonds bore an interest rate higher than that permitted by law. The interest rate on the bonds was 9.75%. Although that rate was permissible under the Bond Authorization Act (Ill. Rev. Stat. 1983, ch. 17, par. 6601 *et seq.)*, it exceeded the 7% ceiling established by section 17-2. 11a of the School Code (Ill. Rev. Stat. 1983, ch. 122, par. 17- 2.11a). The taxpayers argued that the School Code provisions, rather than the ceiling imposed by the Bond Authorization Act, controlled. The appellate court agreed. *Bates v. Board of Education, Allendale Community Consolidated School District No. 17*, 183 Ill. App. 3d 164 (1989). The defendant school district then appealed to our court.

While the matter remained on appeal, the General Assembly enacted Public Act 86-4 (Pub. Act 86-4, eff. June 6, 1989). That statute (1) validated all government instruments for payment of money duly issued before the effective date of the Act provided, among other things, that they comported with any of Illinois' omnibus bond authorization acts; (2) amended the School Code by deleting the 7% interest-rate ceiling on school-issued bonds and substituting the interest ceiling set forth in the Bond Authorization Act; and (3) declared that the legislature had always intended that bonds issued under the School Code be permitted to take advantage of less restrictive provisions of Illinois' omnibus bond acts either before, on, or after the effective date of the new law. *Bates*, 136 Ill. 2d at 264-65.

To the extent that Public Act 86^4 purported to ascribe a different legislative intent to the prior version of the law than the one declared by the appellate court, our court found that the Act violated separation of powers principles under the Illinois Constitution. *Bates,* 136 Ill. 2d at 267. Insofar as the Act reached back to validate the challenged school bonds, however, our court held that it was merely curative legislation. That aspect of the legislation did not attempt to attribute to the statute a meaning different from the one declared in the appellate court's opinion. Rather it provided authorization for the higher interest rate, authorization that the General Assembly unquestionably could have granted at the time the bonds were originally issued. In exercising that authority after the fact, the legislature infringed no protected rights because, at the time the amendatory Act took effect, final judgment had not yet been rendered in the case. It remained pending on appeal. Accordingly, our court held that this aspect of the Act did not violate separation of powers principles and was valid. *Bates,136* Ill. 2d at 268-70.

The legislation in the present case is directly analogous to curative provisions of Public Act 86-4, the statute at issue in *Bates.* No after-the-fact declaration of intent was made concerning the preamendatory law. No final judgment was disturbed. Prior to this proceeding, the specific taxes at issue, those for 1997, had not been invalidated by a court of law. When the General Assembly enacted Public Act 94-692 and specifically validated the 1997 hard-road taxes whose legality was subject to challenge under the preamendent versions of the Illinois Highway Code and Township Code, it engaged in a course of conduct that it would unquestionably have been entitled to undertake before the taxes were levied. Moreover, as in *Bates,* when the new law went into effect, the legal proceedings initiated by the plaintiffs in this case were not final. The case remained pending. Although the new law produced a different result than was reached by the appellate court in *Ceres One Corp.,* the General Assembly may enact retroactive legisla-

tion which changes the effect of a prior decision of a reviewing court with respect to cases which have not been finally decided. *Sanelli v. Glenview State Bank*, 108 Ill. 2d 1, 19 (1985). We therefore reject plaintiffs' contention that Public Act 94-692 violated the separation of powers provisions of the Illinois Constitution.

2. Due Process Under the Illinois and Federal Constitutions

Plaintiffs next argue that application of Public Act 94-692 to validate the 1997 hard-road tax levy would violate their rights to due process under article I, section 2, of the Illinois Constitution of of 1970 and the fourteenth amendment to the United States Constitution (U.S. Const., amend. XIV). This argument must also fail. That a tax measure has retroactive application does not necessarily place it in violation of the state and federal constitutions. Taxes imposed pursuant to state law may withstand due process scrutiny even where, as here, they apply retroactively provided that certain requirements are met. See *Commonwealth Edison*, 196 Ill. 2d at 43-44.

Whether a retroactive tax measure contravenes state or federal due process protections depends on the circumstances of each case. The pivotal inquiry is whether retroactive application is so harsh and oppressive as to transgress constitutional limitations. In making that determination, courts have considered various factors. Among these are (1) the legislative purpose for which the statute was enacted, (2) the length of the period of retroactivity, (3) whether the taxpayer reasonably and detrimentally relied on the prior law, and (4) whether the taxpayer had adequate notice of the change in the law. *Commonwealth Edison*, 196 Ill. 2d at 43-44.

The United States Supreme Court has been very reluctant to override legislative judgment concerning the necessity for

retroactive taxation. Consistent with that view, the scope of inquiry under the due process clause of the federal constitution is extremely limited. In that regard, we note, as we did in *Commonwealth Edison*, that neither lack of notice nor detrimental reliance are dispositive factors in determining whether the retroactive application of a tax amendment violates federal due process guarantees. *Commonwealth Edison*, 196 Ill. 2d at 44, citing *United States v. Carlton*, 512 U. S. 26, 33-34, 129 L. Ed. 2d 22, 30, 114 S. Ct. 2018, 2023 (1994); C. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 706 (1960).

With respect to the question of legislative purpose, we have held that legislation applying a tax measure retroactively must not be illegitimate or arbitrary. *Commonwealth Edison*, 196 Ill. 2d at 44. Plaintiffs in this case assert that they, and possibly their lawyer, were singled out for retribution because the appellate court ruled in their favor. While use of retroactive taxation as a means of retribution against unpopular groups or individuals is impermissible *(Commonwealth Edison*, 196 Ill. 2d at 44, citing *Carlton*, 512 U.S. at 32, 129 L. Ed. 2d at 29, 114 S. Ct. at 2023), we find nothing in the record to support the contention that these plaintiffs or their lawyers were in any way singled out by the General Assembly. The taxes validated by Public Act 94-692 applied generally to taxpayers in Naperville Township. They were not limited to these plaintiffs. Moreover, there is no indication that the General Assembly had any purpose other than to correct an error in the Road District's hard-road tax levy after the problem was brought to its attention by township officials.

Plaintiffs intimate that the township's desire to avoid the effect of the appellate court's judgment in *Ceres One Corp.* and the fact that the legislation was initially vetoed by the Governor are indicative of an improper purpose. We disagree. As we have discussed, curative legislation is permissible under Illinois law. That being so, we can see no impropriety in approaching one's legislators to obtain such curative legislation, as

Naperville Township officials did. While plaintiffs may strongly disagree with the decision of those local elected officials to seek legislative recourse in the General Assembly, their frustration that the General Assembly intervened to validate the challenged tax is not sufficient justification for judicial nullification of an otherwise valid legislative enactment. Plaintiffs' recourse for such conduct by their elected representatives is through the political process, not the courts.

We likewise reject the notion that the Governor's attempt to veto Public Act 94-692 is indicative of any improper purpose by the legislature. The statement issued by the governor when he vetoed the law explained that he did not want to intercede in a taxing scheme which he believed should be left to local voters. He was entitled to express that view and to exercise his veto power. The General Assembly, however, was equally entitled to reject the governor's view and override his veto. See Ill. Const. 1970, art. IV, §9. It did so. Nothing in either the governor's action or the legislature's reaction suggests that anything improper occurred.

The next factors we must consider under our due process analysis are the length of the period of retro activity, whether the taxpayer reasonably and detrimentally relied on the prior law, and whether the taxpayer had adequate notice of the change in the law. Under the facts of this case, these considerations are inconsequential. While Public Act 94-692 pertained to a tax levy made seven years earlier, its enactment did not alter plaintiffs' position. They had already paid the taxes for the year in question. The new law did not increase the tax rate, eliminate deductions or exemptions, or affect in any way the amount of taxes for which plaintiffs had originally been billed by the county's collector of revenue. It merely cured a technical problem with the manner in which the taxes had been authorized. In light of the appellate court's decision in *Ceres One Corp.*, decided before the new law took effect, plaintiffs may have hoped for a refund of their 1997 taxes. That hope, however, had not yet ripened into a final judgment in their

favor. To the contrary, at the time the new legislation was enacted, all the appellate court had done is reverse summary judgment in favor of the Road District and remand for further proceedings. Under the appellate court's decision, there remained a possibility that the 1997 tax levy would still be valid under the prior version of the law.

So far as we can tell, there is but one thing plaintiffs might have done differently had they known earlier that the Public Act 94-692 would be enacted. They might have decided against filing an objection to the 1997 hard-road tax levy in the first place. Had no such challenge been brought, however, plaintiffs would still have been required to pay the tax, just as they are required to pay it under the judgment we render today. The only difference is that they would have saved whatever money they expended for fees and costs in prosecuting their objection. In the end, those legal fees yielded them no benefit. That, however, is an inherent risk in all litigation. It is not a sufficient justification for nullifying otherwise valid curative legislation. We therefore do not believe that plaintiffs have sustained their burden of clearly showing that Public Act 94-692 is unconstitutional.

CONCLUSION

Public Act 94-692 cured the defects on which plaintiffs' challenge to the Road District's 1997 hard-road tax levy was based. Retroactive application of that curative legislation statute was permissible under Illinois law. It did not violate principles of separation of powers or deprive plaintiffs of their rights to due process under the state or federal constitutions. The Road District was therefore entitled to summary judgment, and the appellate court erred in reversing the circuit court's entry of summary judgment in favor of the Road District and against plaintiffs.

For the foregoing reasons, the judgment of the appellate court is reversed. The judgment of the circuit court is affirmed. The cause is remanded to the circuit court for further proceedings consistent with this opinion.

Appellate court judgment reversed;
circuit court judgment affirmed;
cause remanded.

JUSTICE BURKE took no part in the consideration or decision of this case.

NOTICE OF ORDER ON REHEARING

Supreme Court of Illinois
Supreme Court Building
Springfield 62701
November 27, 2006

Juleann Hornyak
Clerk of the Court
(217) 982-2035

Mr. James A. Rooney
Rooney & Bilton, LLC
77 W. Washington St.
Suite 1414
Chicago, Illinois 60602

No. 100682

Allegis Realty Investors et al., appellees, v.John Lotus Novak, County Treasurer and Ex-Cons.officio County Collector of DuPage County, Illinois, et al., appellants.

Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on January 2, 2007

Burke, J., took no part.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Amendment XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Public Act 094-0692
HB3651 Enrolled LRB094 06532 BDD 37279 b

AN ACT concerning highways.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Township Code is amended by changing Section 30-20 as follows:

(60 ILCS 1/30-20)

Sec. 30-20. Powers of electors at annual township meeting.

(a) The electors present at the annual township meeting have the powers enumerated in this Article 30. An elector is a person registered to vote within the township no less than 28 days before the date of the annual meeting.

(b) Notwithstanding the provisions of any other Act, except as provided in Section 6-620 of the Illinois Highway Code, before establishing or increasing any township tax rate that

may be established or increased by the electors at the annual township meeting, a petition containing the signatures of not less than 10% of the registered voters of the township must be presented to the township clerk authorizing that action.

(c) Nothing in this amendatory Act of 1983 (Public Act 83-281) shall be construed to alter existing tax rates.

(Source: P.A. 88-62; 89-331, eff. 8-17-95.)

Section 10. The Illinois Highway Code is amended by adding Section 6-620 as follows:

(605 ILCS 5/6-620 new)

Sec. 6-620. Validation of certain levies.

(a) Any road district tax that was authorized by the electors at an annual or special town meeting during the years 1975 through 1979 for a period not exceeding 5 years, but that was not re-authorized within 5 years after it was authorized due to Public Acts 81-779, 81-821, and 81-1509, which repealed the 5-year limitation, is hereby validated for all tax levy years subsequent to 1980 only to the extent that the authority to tax did not automatically expire after 1980.

(b) Any road district tax that was levied prior to 1980 shall not be subject to the requirements of subsection (b) of Section 30-20 of the Township Code if that tax was or is:

(i) re-authorized by the electors at an annual or special town meeting after the year 1980; and

(ii) levied at least once during the 3-year period preceding the reauthorization.

Section 99. Effective date. This Act takes effect upon becoming law. **Effective Date:** 11/3/2005

Section 23-5 of the Property Tax Code (35 ILCS 200/23-5)

Sec. 23-5. Payment under protest. Beginning with the 1994 tax year in counties with 3,000,000 or more inhabitants, and beginning with the 1995 tax year in all other counties, if any person desires to object to all or any part of a property tax for any year, for any reason other than that the property is exempt from taxation, he or she shall pay all of the tax due within 60 days from the first penalty date of the final installment of taxes for that year. Whenever taxes are paid in compliance with this Section and a tax objection complaint is filed in compliance with Section 23-10, 100% of the taxes shall be deemed paid under protest without the filing of a separate letter of protest with the county collector.
(Source: P.A. 88-455; 89-126, eff. 7-11-95.)

Section 23-10 of the Property Tax Code (35 ILCS 200/23-10)

Sec. 23-10. Tax objections and copies. Beginning with the 2003 tax year, in counties with 3,000,000 or more inhabitants, the person paying the taxes due as provided in Section 23-5 may file a tax objection complaint under Section 23-15 within 165 days after the first penalty date of the final installment of taxes for the year in question. Beginning with the 2003 tax year, in counties with less than 3,000,000 inhabitants, the person paying the taxes due as provided in Section 23-5 may file a tax objection complaint under Section 23-15 within 75 days after the first penalty date of the final installment of taxes for the year in question. However, in all counties in cases in which the complaint is permitted to be filed without payment under Section 23-5, it must be filed prior to the entry of judgment under Section 21-175. In addition, the time specified for payment of the tax provided in Section 23-5 shall not be construed to delay or prevent the entry of judgment against, or

the sale of, tax delinquent property if the taxes have not been paid prior to the entry of judgment under Section 21-175. An objection to an assessment for any year shall not be allowed by the court, however, if an administrative remedy was available by complaint to the board of appeals or board of review under Section 16-55 or Section 16-115, unless that remedy was exhausted prior to the filing of the tax objection complaint.
When any complaint is filed with the court in a county with less than 3,000,000 inhabitants, the plaintiff shall file 3 copies of the complaint with the clerk of the circuit court. Any complaint or amendment thereto shall contain (i) on the first page a listing of the taxing districts against which the complaint is directed and (ii) a summary of the reasons for the tax objections set forth in the complaint with enough copies of the summary to be distributed to each of the taxing districts against which the complaint is directed. Within 10 days after the complaint is filed, the clerk of the circuit court shall deliver one copy to the State's Attorney and one copy to the county clerk, taking their receipts therefor. The county clerk shall, within 30 days from the last day for the filing of complaints, notify the duly elected or appointed custodian of funds for each taxing district that may be affected by the complaint, stating (i) that a complaint has been filed and (ii) the summary of the reasons for the tax objections set forth in the complaint. Any amendment to a complaint, except any amendment permitted to be made in open court during the course of a hearing on the complaint, shall also be filed in triplicate, with one copy delivered to the State's Attorney and one copy delivered to the county clerk by the clerk of the circuit court. The State's Attorney shall within 10 days of receiving his or her copy of the amendment notify the duly elected or appointed custodian of funds for each taxing district whose tax monies may be affected by the amendment, stating (i) that the amendment has been filed and (ii) the summary of the reasons for the tax objections set forth in the amended complaint. The State's Attorney shall also notify the custodian and the county clerk in writing of the

date, time and place of any hearing before the court to be held upon the complaint or amended complaint not later than 4 days prior to the hearing. The notices provided in this Section shall be by letter addressed to the custodian or the county clerk and may be mailed by regular mail, postage prepaid, postmarked within the required period, but not less than 4 days before a hearing.
(Source: P.A. 93-378, eff. 7-24-03.)

Section 23-15 of the Property Tax Code (35 ILCS 200/23-15)

Sec. 23-15. Tax objection procedure and hearing.
(a) A tax objection complaint under Section 23-10 shall be filed in the circuit court of the county in which the subject property is located. Joinder of plaintiffs shall be permitted to the same extent permitted by law in any personal action pending in the court and shall be in accordance with Section 2-404 of the Code of Civil Procedure; provided, however, that no complaint shall be filed as a class action. The complaint shall name the county collector as defendant and shall specify any objections that the plaintiff may have to the taxes in question. No appearance or answer by the county collector to the tax objection complaint, nor any further pleadings, need be filed. Amendments to the complaint may be made to the same extent which, by law, could be made in any personal action pending in the court.
(b) (1) The court, sitting without a jury, shall hear and determine all objections specified to the taxes, assessments, or levies in question. This Section shall be construed to provide a complete remedy for any claims with respect to those taxes, assessments, or levies, excepting only matters for which an exclusive remedy is provided elsewhere in this Code.
(2) The taxes, assessments, and levies that are the subject of the objection shall be presumed correct and legal, but the presumption is rebuttable. The plaintiff has the burden of proving any contested matter of fact by clear and convincing evidence.

(3) Objections to assessments shall be heard de novo by the court. The court shall grant relief in the cases in which the objector meets the burden of proof under this Section and shows an assessment to be incorrect or illegal. If an objection is made claiming incorrect valuation, the court shall consider the objection without regard to the correctness of any practice, procedure, or method of valuation followed by the assessor, board of appeals, or board of review in making or reviewing the assessment, and without regard to the intent or motivation of any assessing official. The doctrine known as constructive fraud is hereby abolished for purposes of all challenges to taxes, assessments, or levies.

(c) If the court orders a refund of any part of the taxes paid, it shall also order the payment of interest as provided in Section 23-20. Appeals may be taken from final judgments as in other civil cases.

(d) This amendatory Act of 1995 shall apply to all tax objection matters still pending for any tax year, except as provided in Sections 23-5 and 23-10 regarding procedures and time limitations for payment of taxes and filing tax objection complaints.

(e) In counties with less than 3,000,000 inhabitants, if the court renders a decision lowering the assessment of a particular parcel on which a residence occupied by the owner is situated, the reduced assessment, subject to equalization, shall remain in effect for the remainder of the general assessment period as provided in Sections 9-215 through 9-225, unless that parcel is subsequently sold in an arm's length transaction establishing a fair cash value for the parcel that is different from the fair cash value on which the court's assessment is based, or unless the decision of the court is reversed or modified upon review.

(Source: P.A. 88-455; 88-642, eff. 9-9-94; 89-126, eff. 7-11-95; 89-290, eff. 1-1-96; 89-593, eff. 8-1-96; 89-626, eff. 8-9-96.)

Taxpayers' Surreply Brief in Supreme Court of Illinois (relevant portion).

"C. Public Act 94-0962 Violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution

For the same reasons that Public Act 94-0962 violates the due process clause of article I, §2 of the Illinois Constitution of 1970, the Act violates the due process clause of the Fourteenth Amendment to the United States Constitution.

As this Court noted in Commonwealth Edison, the Supreme Court of the United States has strictly limited the scope of inquiry under the due process clause of our federal constitution. That Court has held that neither lack of notice nor detrimental reliance (factors 3 and 4 above) are "dispositive" factors in determining whether the retroactive application of a tax amendment violates the due process clause. United States v. Carlton, 512 U.S. 26, 33-34, 129 L. Ed. 2d 22, 30-31, 114 S. Ct. 2018, 2023.

Of greater significance to the Supreme Court is the purpose of the amendment and the length of the period of retroactive effect. Carlton, 512 U.S. at 32-33, 129 L. Ed. 2d at 29-30, 114 S. Ct. at 2023.

The purpose of this Act was to target these taxpayers (and perhaps their counsel) for vigorously exercising their right to a postdeprivation hearing on the taxes they were compelled to pay under protest as a precondition to filing their suit. And, here, the "true" length of the period of retroactivity is 26 years.

Recently, the Supreme Court of the United States has been concerned with what it noted are referred to as "bait and switch" tactics where a State promises a postdeprivation hearing if a tax is paid and then, in mid-course, declares that the postdeprivation remedy does not exist. In Reich v. Collins, 1994, 513 U.S. 106, 108, 130 L. Ed. 2d 457, 115 S. Ct. 547, 549, the United States Supreme Court stated:

"A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation) or both. But what it may not do, and what Georgia did here, is hold out what plainly appears to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." 513 U.S. at 108, 130 L. Ed. 2d at 457, 115 S. Ct. At 549.

Accord, Newsweek, Inc. v. Florida Department of Revenue, 1998, 522 U.S. 442, 444-445, 139 L. Ed. 2d 888, 891, 118 S. Ct. 904, 905 ("While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.").

Taxpayers see no difference between a court construing a statute to deny a postdeprivation remedy and the legislature passing a retroactive statute to deny a postdeprivation remedy.

Public Act 94-0962, if applied retroactively in this case, violates the due process clause of the Fourteenth Amendment to the United States Constitution. . . ." Surreply Brief, p. 25-27.

Taxpayers' Petition for Rehearing, Supreme Court of Illinois (relevant portion).

"IV.

TAXPAYERS' FEDERAL AND STATE DUE PROCESS ARGUMENTS ARE INCOMPLETELY ADDRESSED AND INCORRECTLY DECIDED BY THIS COURT

While the method of analysis used by this Court in analyzing a claim of lack of due process is purportedly the one adopted by

the Supreme Court of the United States in the Landgraf case, the standards used by this Court are quite different. Moreover, the Supreme Court of the United States has adopted a stricter limit to retroactivity where a postdeprivation remedy has been utilized. This Court has failed to address this stricter limit. This point seeks a rehearing under the due process clauses of the Illinois and federal Constitutions.

A. Landgraf analysis.

Under general federal analysis of a retroactive statute, the Supreme Court of the United States has only approved an amendatory statute with a backward temporal reach of "only slightly greater than one year." United States v. Carlton, 1994, 512 U.S. 26, 33, 129 L. Ed. 2d 22, 30, 114 S. Ct. 2018, 2023. One reason given was that the act "established only a modest period of retroactivity" and the use of this customary practice by Congress "has been confined to short and limited periods . . ." 512 U.S. at 32-33, 129 L. Ed. 29, 114 S. Ct. at 2023.

Carlton was cited to this Court in taxpayers' surreply (and even cited by this Court in its opinion) - but no mention is made of the more restrictive federal standard as to length of retroactivity suggested in Carlton.

In deciding taxpayers' due process claims, this Court's opinion admits that the curative act has a backward temporal reach of an immodest seven years. Yet, it finds that seven year period of retroactivity to be "inconsequential." Slip Opinion, p. 16. In doing so, the dispositive factor of "the length of the period of retroactivity" is improperly conflated with the admittedly non-dispositive factors of "reasonable and detrimental reliance on the prior law" and "adequate notice of the change in the law" as if they were all one insignificant factor rather than one significant, dispositive factor and two lesser non-dispositive factors.

In Commonwealth Edison Co. V. Will County Collector, 2001, 196 Ill. 2d 27, the case where this Court adopted the

Landgraf method analysis and a case involving only a State claim of lack of due process, this Court noted its prior holding in the Henrich case that a retroactive period of almost four years in an amendatory act would improperly disturb the settled expectation of a school district's defense to a tort immunity claim. Here, the court has found that seven years is not too long to disturb the settled expectation to a claim itself (which claim is actually a defense against improper taxation). Under either the federal or Illinois Constitution are defenses to claims more settled by the passage of four years than the claim itself is by the passage of seven years?

This Court has long agreed that there is no rational difference in the way claims and defenses to claims should be treated under the due process clause of the Illinois Constitution. Henrich, 186 Ill. 2d at 404-405. If almost four years is too long a period of retroactivity to affect a defense to a claim, an immodest seven years is far too long a period of retroactivity to affect a claim.

Taxpayers argued that this Court's explanation of the Henrich case in Commonwealth Edison was an indication that a period of retroactivity of more than four years was not allowed. Surreply Brief, p. 21-22. Henrich is not mentioned and there is no response to taxpayers' argument in the opinion of this Court.

Moreover, under federal analysis of a claim of lack of due process, a retroactive tax statute may not be used as retribution by singling out an unpopular group of individuals. "There is no plausible contention that Congress acted with an improper motive, as by targeting (them) after deliberately inducing them to enter into (tax avoidance) transactions." Carlton, 312 U.S. at 32, 129 L. Ed. 2d at 29, 114 S. Ct. at 2023.

Taxpayers pointed out that the district officials judicially admitted that they approached the Legislature "to request help with the impact of the Court's decisions in this case and the Ceres One case." District Reply Brief, p. 4. This Court replied,

inter alia, that "we find nothing in the record to support the contention" of improper purpose. Slip Opinion, p. 15.

The district cannot have it both ways. Either these taxpayers were not singled out (after being compelled, not just induced, to follow a postdeprivation remedy) because there was no clear intent to affect this pending action or they were singled out because there was a clear intent to affect this pending action. Taxpayers suggest either the judicial admission in the district's reply brief should be given legal effect or this Court should find no clear intent to affect this case.

What this Court has done, and what it cannot do, is find that the curative act "intrinsically" affected this case but the taxpayers were not singled out. In light of the judicial admission by the district, that distinction is far too fine for analysis of a due process claim.

B. Curative or not, retroactive legislation may not be used to deprive a taxpayer of "meaningful backward-looking relief" once an apparent "clear and certain" postdeprivation remedy is utilized.

In analyzing the claim of improper purpose, this Court found that the enactment of the curative act did not alter taxpayers' position. Slip Opinion, p. 16. When taxpayers paid their taxes under protest (deposited their property with the taxing authorities), they did not forfeit all rights to that property. After the enactment of the curative act, this Court found that taxpayers have no right to a return of that property. Yet, prior to the enactment, taxpayers had a fully accrued right to the meaningful backward-looking relief selected by Illinois (a refund of the illegal tax) through the "clear and certain" postdeprivation remedy which they were forced to pursue.

Section 23-15(b)(1) of the Illinois Property Tax Code declares that the Illinois postdeprivation remedy "shall be construed to provide a complete remedy for all claims to those taxes,

assessments, or levies" paid under protest. 35 ILCS 200/23-15(b)(1).

In People ex rel Sweitzer v. Orrington Company, 1935, 360 Ill. 289, a case concerning a predecessor enactment of the remedy by objection now found in the Property Tax Code, this Court noted the abolition of the voluntary payment system and the institution of the payment under protest system. This Court held that "the provision for the refund is as mandatory as that for the payment." 360 Ill. at 293-294.

Apparently, this contract with taxpayers no longer has mutuality. The advance payment is still mandatory but the expectation that the refund be made may be unilaterally disturbed for at least an immodest seven years.

Section 23-15(b)(1) was cited to this Court as now providing the mandatory refund mentioned in the Orrington Company case, the case where this Court held that the refund is as mandatory as the payment. Surreply Brief, p. 12.

This Court's opinion does not mention the Orrington Company case, its holding or the language of section 23-15(b)(1).

This omission is critically important because taxpayers also cited to this Court two cases, the latest in a line of cases, in support of their federal due process claim. The cases were cited in addition to the cases taxpayers cited concerning their State due process claim. The cases are Reich v. Collins, 1994, 513 U.S. 106, 108, 130 L. Ed. 2d 454, 457, 115 S. Ct. 547, 549 and Newsweek, Inc. v. Florida Department of Revenue, 1998, 522 U.S. 442, 445-446, 139 L. Ed. 2d 888, 891, 118 S. Ct. 904, 905. Surreply Brief, p. 26.

Reich and Newsweek, Inc. impose a stricter limit to retroactivity when a "clear and certain" postdeprivation remedy has been used to contest an illegal tax.

In both opinions, the Supreme Court of the United States held that once the illegal tax is paid, the postdeprivation

remedy cannot later be declared to be unavailable to the taxpayer. In Reich, a unanimous Supreme Court of the United States decried the "bait and switch" tactic used by Florida against taxpayers.

Both opinions are mere extensions of the earlier holdings set forth in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. Of Business Regulation, 1990, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S. Ct. 2238 and Harper v. Virginia Department of Taxation, 1993, 509 U.S. 86, 125 L. Ed. 2d 74, 113 S. Ct. 2510 that where a State imposes substantial penalties for non-payment of a tax which force taxpayers into a postdeprivation situation, the due process clause of the Fourteenth Amendment requires the State to provide meaningful backward-looking relief. Reich, 513 U.S. at 109-110, 130 L. Ed. 2d at 458, 115 S. Ct. at 458; Newsweek, Inc., 522 U.S. at 443-444, 139 L. Ed. 2d at 890-891, 118 S. Ct. at 904-905. Further, as McKesson points out in great detail, the proposition that a State must provide meaningful backward-looking relief if it coerces taxpayers into a postdeprivation remedy is not new law.

Illinois places great duress on taxpayers who do not pay their property taxes. Exorbitant interest (1½% per month or portion thereof) is charged for late payments. Sections 21-15, 21-20 and 21-25 of the Property Tax Code (35 ILCS 200/21-15, 21-20 and 21-25). If the annual tax is not paid, the property may be sold for unpaid taxes. Sections 21-190, et seq., of the Property Tax Code (35 ILCS 200/21-190, et seq.).

Actually, the federal cases mentioned in McKesson were foreshadowed by this Court, a court which used to be in the forefront of protecting constitutional rights. In Board of Education v. Blodgett, 1895, 155 Ill. 441, this Court agreed with the vigorous dissent of Justice Bradley, joined by Justice Harlan, in Campbell v. Holt, 1885, 115 U.S. 620, 29 L. Ed. 483, 6 S. Ct. 209, which dissent stated, *inter alia*,:

"In an advanced civilization like ours a very large proportion of the property of individuals is not visible and tangible, but consists of rights and claims against others or against government itself. Now, an exemption from a demand or an immunity from prosecution in a suit is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected and that the other is not, seems to me almost an absurdity. One right is as valuable as the other. . . . Remedies are the life of rights, and are equally protected by the constitution. Deprivation of a remedy is equivalent to a deprivation of the right to which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away." 155 Ill. at 449-450.

Neither Reich nor Newsweek, Inc. (nor any of the cases cited therein, McKesson and Harper) are even mentioned in this Court's opinion.

Finally, in making the declaration that the curative act can destroy the right to any "meaningful backward-looking relief" set forth in the "clear and certain" Illinois statutory remedy, this Court stated:

"Had no such challenge been brought, however, plaintiffs would still have been required to pay the tax, just as they are required to pay it under the judgment we render today. The only difference is that (taxpayers) would have saved whatever money they expended for fees and costs in prosecuting their objection. In the end, those legal fees yielded them no benefit. That, however, is not a sufficient justification for nullifying otherwise valid curative legislation." Slip Opinion, p. 17; insert for clarity.

Taxpayers never asserted in their surreply that legal fees and costs were in any way related to a justification of their obtaining benefit from this suit. Fee and costs were not mentioned at all in any of their pleadings, motions or briefs. Legal fees and minimal costs are not the duress placed upon

taxpayers by Illinois which coerces them into a postdeprivation remedy. Exorbitant interest and the threat of loss of their property are the duress. Moreover, even before the statute was amended to declare the remedy by refund to be "complete," this Court held, in the limited situations where equitable relief may be available. the statutory remedy is cumulative. Owens-Illinois Glass Company v. McKibben, 1944, 385 Ill. 245, 255. And, this Court has even held that county clerks must extend illegal levies filed with them, noting the taxpayers are the only parties that may challenge the tax. City of Rockford v. Gill, 1979, 75 Ill. 2d 334, 342.

The above quotation from the opinion concerning legal fees and costs is merely a gratuitous response to a "straw man" argument this Court raises on its own. Taxpayers are as flummoxed by the inclusion of the response in the opinion of this Court as they are by the lack of any response in the opinion to arguments they did make.

At most, what taxpayers have argued here is that their paying the taxes under protest and securing an attorney to pursue their claims in the postdeprivation remedy amounts to a Landgraf showing of reasonable reliance upon the "clear and certain" statutory remedy ("a complete remedy for any claims with respect to those taxes, assessments, or levies").

The interest of the State in fiscal security is sufficiently protected by the requirement of full payment of the tax prior to filing suit and a short statute of limitations within which any suit for a refund must be filed can be used to limit the amount of lost revenue. McKesson, 496 U.S. at 50, 110 L. Ed. 2d at 44, 110 S. Ct. at 2257. Here, the taxes must be paid under protest and the statute of limitations on suits for refunds is a mere 75 days from the date of payment. Sections 23-5 and 23-10 of the Property Tax Code (35 ILCS 200/23-5 and 23-10).

Curative acts reaching back 7 years protect no legitimate State interest. They merely demonstrate the "lawlessness" Illinois can exhibit to foreign corporations engaging in inter-

state commerce in Illinois who own or net lease real estate - and have no opportunity to vote out the lawmakers.

For all of the reasons stated above, taxpayers respectfully suggest that the opinion contains an incomplete and erroneous analysis of taxpayers' State and federal claims of a lack of due process." Petition for Rehearing, p. 16-27.